Supreme Court, U.S.
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In The

Supreme Court of the United States

NATHAN DAVIS, JR., and JESSE ANDREWS,

Petitioners,

v.

TANGIE JUDY and DANNY MULLINS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In applying the constitutional liability standard of deliberate indifference, this Court has determined that government officers may not be held liable if they made reasonable efforts to alleviate a known risk of harm to persons in their custody. May a court properly find that officers' efforts were unreasonable simply because those efforts did not succeed, or because the officers failed to use measures beyond their authority, or because the court would have selected other measures?

2. Despite their constitutionally impermissible conduct, government officials may be shielded from liability if their actions did not violate clearly established constitutional rights of which a reasonable person would have known. This Court has held that governing law may have been clearly established even without a prior decision based on "materially similar" facts, if the illegality of the officers' conduct was obvious. If the illegality was *not* obvious, may a court fairly apply the same rule?

PARTIES BELOW

1. The caption of this Petition contains the names of all parties to the proceeding in the court of appeals, except for Eugene P. Walker. Walker was a defendant-appellant in the court of appeals, but he is not a Petitioner here. Unlike the other two defendants-appellants below (who are Petitioners in this Court), Walker received a favorable decision in the court of appeals: that court reversed the district court's denial of qualified immunity as to him. Appendix, *infra*, at 1a, 6a, 24a-25a.

2. The caption of the court of appeals' opinion suggests that, aside from those who are Petitioners and Respondents in this Court, other parties remain in the litigation. The court of appeals' caption lists "Tom Coleman, etc., et al." as defendants (*id.* at 1a), but Mr. Coleman and Robert Riols, the fifth original defendant, were dismissed without prejudice by the district court in 2000 and have not been participants in any appeal.

3. Similarly, the court of appeals' caption designates Eugene P. Walker, Nathan Davis, and Jesse Andrews as being sued both individually and in their official capacities, while it omits Danny Mullins as a plaintiff-appellee. *Id.* The district court dismissed all claims against the defendants in their official capacities and added Mr. Mullins as a plaintiff in 1998, prior to appeal. *Id.* at 28a n. 2, 32a.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Nathan Davis, Jr., and Jesse Andrews respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in the above-entitled proceeding on May 30, 2003.

OPINIONS BELOW

The opinion of the court of appeals (Appendix, *infra*, 1a-26a) is unreported, with only the result being noted in a table: *Judy v. Walker*, 2003 WL 21282220 (11th Cir. May 30, 2003). The district court's order denying summary judgment on qualified immunity (App., *infra*, 27a-28a) is unreported, as is a related order (*id.* at 29a-38a).

JURISDICTION

The court of appeals entered its opinion and judgment on May 30, 2003 (*id.* at 1a). It entered its denial of Petitioners' Petition for Rehearing En Banc on July 25, 2003 (*id.* at 38a). This Court has jurisdiction under 28 U.S.C. § 1254(1) (2000).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. 14, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or

> enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 (2000):

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT

This case raises important, recurring questions concerning both the proper scope of the deliberate indifference standard in cases under 42 U.S.C. § 1983 and the faithful implementation of this Court's rules for qualified immunity.

The Incident Involving Respondent. The case arises from the beating and alleged sexual assault of Respondent Mullins by his three roommates one night in March 1996, while they were all detainees at the Gwinnett Regional Youth Detention Center in Lawrenceville, Georgia. Mullins, who was 16 at the time, had recently been ordered by a juvenile judge to be detained for 30 days at the Center for violation of the probation that had been imposed on him for an unruliness adjudication. Prior to that adjudication and detention, Mullins had spent almost two years in a juvenile residential program due to his seriously disruptive behavior at home, and once he had also spent a three-day stay at the Center. App., *infra*, at 9a-10a; Record, Document 110A, ¶¶1, 7.

Upon Mullins' second detention at the Center (the period that included the incident at issue here), the workers there had first placed him unsuccessfully in two separate residential rooms. In the third room (where the incident occurred) one of the roommates was smaller than Mullins but was detained on a similar charge, and the other two – taller but thinner and younger than Mullins – were detained on felony charges involving firearms. App., *infra*, at 10a; R. Doc. 110B, ¶¶113-115. On the evening of Mullins's transfer by a worker to that third room, the three other roommates began at lights-out to "initiate" Mullins by wrestling with him. At that point a Center staff member, making his prescribed every-half-hour check, walked down the hallway outside the room. One of the roommates told everyone to lie down and be quiet. Mullins made no outcry. R. Doc. 110B, ¶¶120, 123. When the worker left, the roommates hit Mullins with their fists, and, according to him, they also forced him to perform fellatio on them.

The next day Mullins reported the incident to Center staff members. At the direction of Petitioner Andrews (who was then the director of the Center), they took Mullins to the local emergency room, where he received medical attention for bruises and an evaluation with a "rape kit" to collect evidence of sexual activity. No such evidence was found, however. Mullins asserted that he had brushed his teeth on awakening that morning, prior to the evaluation. Staff members also transferred Mullins's roommates to other detention centers. At the request of Petitioner Davis (who was then in charge of the 20 centers statewide), an investigator for the juvenile detention system launched an inquiry into the incident. App., *infra*, at 10a-11a. Each of the roommates admitted hitting Mullins but vehemently denied the sexual allegation. The investigator filed a criminal complaint against each of Mullins's roommates for aggravated sodomy, but the local prosecutor refrained from indicting and trying the three. *Id.* at 29a-30a; R. Doc. 110A, ¶¶12-14.

The Juvenile Detention System. At the time of this incident, as now, the control of Georgia's juvenile detention system was divided between the State's courts and its Department of Juvenile Justice. On one side, the State constitution and statutes empowered the juvenile court (and the court of general jurisdiction, in the most serious cases) in each county to commit to the Department delinquent youths and those unruly youths who are not amenable to community-based treatment, and also to detain youths pending their adjudication and disposition. *E.g.*, Ga. Const. art. VI, § 1, ¶¶1, 4; O.C.G.A. § 15-11-67 (2001) (in 1996, this provision was § 15-11-36). On the other side, Georgia law authorized the Department to establish and operate for these youths pretrial centers (such as the one

involved here), posttrial facilities, and community-based services. *E.g.*, O.C.G.A. § 15-11-48(a) (2001) (formerly § 15-11-20(a)), 49-4A-4 (2002). The Department was required to pay for all of its own operations out of the sums appropriated to it by the General Assembly, since Georgia law prohibits deficit financing of governmental operations. *See Briarcliff Haven, Inc. v. Dep't of Human Resources*, 403 F. Supp. 1355, 1361 (N.D.Ga. 1975).

Neither the Department's pretrial detention division nor the individual pretrial centers could legally control admissions to the centers; instead, the judges and court workers did so. *E.g.*, O.C.G.A. § 15-11-47(a)(3) (2001) (formerly § 15-11-19(a)(3)). The statutory criteria for detaining youths gave considerable leeway for interpretation, permitting detention at the pretrial centers whenever the judge or other decisionmaker found probable cause for the existence of the act or condition charged and found a need to protect persons or property, to prevent flight, or just to provide care *in loco parentis* pending trial. O.C.G.A. § 15-11-46 (2001) (formerly § 15-11-18).

Outright discharges from centers also lay outside the legal control of division and center administrators. *E.g.*, O.C.G.A. § 15-11-49(a) (2001) (formerly § 15-11-21(a)). Court approval was required to release or even transfer center detainees who were still awaiting adjudication and disposition. Even some youths who had already been committed to the Department but who remained at the centers awaiting long-term placement could not be released without court approval. Other committed youths could be conditionally released by the Department if it would be safe for the public, but release and placement decisions were made by a screening committee in another Department division. In admitting and discharging youths

at the centers, the division and center administrators essentially had only the power of persuasion, which they used in attempting to get the judges and other decision-makers to divert juveniles instead of detaining them or, failing that, to release them once detained.

Conditions and Their Amelioration. The division's and centers' lack of legal authority to control detainee population, along with rising numbers of juvenile offenses and the General Assembly's failure to appropriate more funding, led to large detainee populations at all of the centers. *See* App., *infra*, at 18a, 23a. This statewide population condition was reflected at the Gwinnett Center; on the morning of the Mullins incident, 67 male and female youths were detained there, even though it was originally designed to sleep 30.

The condition respecting detainee safety at the centers is harder to quantify, with the conclusion about that condition depending in great part on what records are used to assess it. At the Gwinnett Center, the disciplinary records kept daily by line workers show, as the court of appeals noted, that "[i]n the one year period prior to the sexual assault on [Respondent Mullins] on March 1, 1996, there were eighty-four incidents of inmate-on-inmate violence, including four instances of inmate-on-inmate sexual assault." App., *infra*, at 5a (the court appears to have erroneously included one staff-on-detainee sexual assault in this number). These records, however, include as "violence" any striking of another person – regardless of the intent, the circumstances, or the consequences. A different perspective is provided by incident reports, which, unlike the disciplinary records, exclude shoving matches, horseplay, and other low-level incidents not producing injuries. R. Doc. 110B, ¶¶97-98; *cf. Hale v.*

Tallapoosa County, 50 F.3d 1579, 1583 (11th Cir. 1995) (jury trial authorized in detention-conditions case based on evidence of incidents of violence "severe enough to require medical attention and even hospitalization on occasion"). By that measure, there were 15 detainee-on-detainee physical attacks at the Center during the 22-month period prior to the Mullins incident, and 3 detainee-on-detainee sexual attacks during that same time. R. Doc. 110B, ¶¶99-102.

Petitioners made ongoing efforts to ameliorate these conditions. Petitioner Davis transferred inmates from one center to another to alleviate overcrowding when possible. He required all center directors to submit to him daily detainee-population reports, monthly statistical reports on disciplinary infractions (including violence), monthly action plans addressing operational problems and their solutions, and incident reports on the more serious episodes of violence when they occurred. He established a detainee classification system based primarily on the level of violence and sexual predation reflected in the detainees' offenses. He required that center directors contact him directly and immediately regarding any serious disturbances or incidents that arose. App., *infra*, at 7a, 10a, 22a.

Petitioner Andrews sent to Petitioner Davis all of the required reports on population and violence at the Gwinnett Center. He took the steps acknowledged later by the court of appeals: "(1) releasing low risk juveniles [with court authorization] to reduce overcrowding; (2) requiring staff to intervene in inmate disputes before the disputes become violent; (3) having the night staff walk down the hallways every half hour; (4) installing an intercom system in each room that was connected to the central control room; and (5) attempting to segregate inmates

based on violent tendencies." App., *infra*, at 17a. Andrews also established a grievance procedure for detainees, hired additional workers on an hourly basis to cover special needs, and met with juvenile judges to discuss ways to manage the flow of offenders that those judges were ordering into detention. He repeatedly asked his superiors for additional funding. At one point he asked Petitioner Davis to impose a "population cap" on the Gwinnett Center, but Davis declined to do so, saying that the entire juvenile detention system was quite crowded, that it would be unfair to cap one center but not the others, and that there was nowhere else for Gwinnett Center detainees to go. *Id.* at 18a; R. Doc. 110B, ¶¶44-48, 51-54, 79-81.

Proceedings Below. In October 1997 Respondents brought this damages action for violation of unnamed parts of the federal Constitution and for violation of 42 U.S.C. § 1983 against five officials of the Department, including Petitioners. Respondents asserted that overcrowding and understaffing caused the assault on Mullins, that the officials had refused to take steps to insure his safety, and that their refusal inflicted cruel and unusual punishment on Mullins and denied him due process of law. App., *infra*, at 31a-32a. In their answer Petitioners and the other officials admitted that Mullins had been physically attacked, denied knowledge of his having been sexually attacked, denied all allegations of wrongdoing by themselves, and raised the defense of official immunity.

After discovery, Petitioners and the other remaining defendant (Eugene Walker, then Commissioner of Juvenile Justice) moved for summary judgment. They primarily argued the constitutional – violation issue, which is the first branch of the immunity defense. *E.g.*, *Siegert v. Gilley*, 500 U.S. 226, 231 (1991). The district court denied

the motion. App., *infra*, at 38a. The officials filed an interlocutory appeal, but the court of appeals held that the officials' qualified immunity argument was "new on appeal" and declined to address that issue. *Id.* at 11a.

On remand, the three officials again moved for summary judgment, this time arguing the clearly-established-law branch of the qualified immunity defense. *Id.* at 12a, 26a. They also asked the district court to reconsider its previous holding as to the constitutional – violation branch. The district court denied the officials' second motion, rejecting reconsideration of the constitutional-violation issue and holding without discussion that "the law was clearly established that defendants had a duty to protect plaintiff Mullins from violence at the hands of other youth" at the Center. *Id.* at 26a.

The officials appealed again, and this time the court of appeals acknowledged that it had jurisdiction to decide the qualified immunity question on an interlocutory basis, pursuant to *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (citing 28 U.S.C. § 1291). *Id.* at 12a, n. 8. The court determined that the Due Process Clause of the Fourteenth Amendment, rather than the Eighth Amendment, applied to this juvenile detention case, but that the liability standard is the same under both Amendments. *Id.* at 14a, n. 11.

Respecting the constitutional-violation branch, the court found that Respondents had produced sufficient evidence to have a jury determine whether conditions at the Gwinnett Center posed a substantial safety risk, whether Petitioners knew of the risk, and whether they disregarded the risk by failing to take sufficient steps to abate it. The court acknowledged that Petitioners had

taken some ameliorative measures, but it held that "none of these steps had any significant impact" on the risk and that no further steps had been taken. App., *infra*, at 17a-18a. The court noted, "For example, to forestall sexual conduct in the girls' wing, Andrews installed a video surveillance system in the hall of the girls[']' wing, yet no similar system was installed on the boys' wing or in the boys' rooms." *Id.* at 18a. In short, the court held that a "prison official must respond to that risk in an *objectively* reasonable manner," and faulted Petitioners because "it *should have been obvious* to defendant Davis that these remedial measures were either ineffective in reducing the severe overcrowding at the [Center] or were unable to be implemented due to the severe overcrowding." *Id.* at 15a, 22a (emphasis added).

Similarly, the court acknowledged that "the impetus of the substantial risk of serious harm due to violence at the [Center] was the combination of a steady stream of juvenile offenders from the juvenile court system and Andrews' inability to secure funding for additional beds, . . . " but it still found a jury question on causation. *Id.* at 18a-19a. As to defendant Walker, however, the court found that the evidence of his knowing about the violence was insufficient to permit a jury verdict that he was deliberately indifferent. *Id.* at 24a-25a.

Regarding the second branch of the immunity defense, the court's entire holding (once it had reiterated some of the pertinent legal rules) was that

> [a]t the time of [Mullins's] assault, the law in this Circuit was clearly established that a prison administrator violates an inmate's Fourteenth Amendment rights when the administrator recklessly disregards known dangers of inmate-on-inmate violence. Indeed, prior to the March 1,

> 1996 incident at issue here, there is [sic] at least one case from the United States Supreme Court and two cases from this Circuit so concluding. *See Farmer [v. Brennan]*, 511 U.S. [825 (1994)] at 834 (concluding that a prison official violates the Eighth Amendment when he is deliberately indifferent to a substantial risk of serious harm); *Hale* [*v. Tallapoosa County*, 50 F.3d 1579 (11th Cir. 1995)] at 1583-84 (same); *LaMarca* [*v. Turner*, 995 F.2d 1526 (11th Cir. 1993), *cert. denied*, 510 U.S. 1164 (1994)] at 1535-36 (same).

App., *infra,* at 20a (essentially repeated at 23a). The court affirmed the denial of summary judgment to Petitioners but reversed it for Walker. *Id.* at 25a.

REASONS FOR GRANTING THE PETITION

I. The Opinion Conflicts with Other Circuits' Decisions, and with this Court's Decisional Framework, on an Open Question of Constitutional Liability.

By permitting a jury to decide under these circumstances whether Petitioners' ameliorative measures were unreasonable, the opinion below improperly defines an element of the deliberate indifference standard. This Court first adopted this liability standard for prisoners' medical treatment claims under the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). It then held that the Fourteenth Amendment provides prisoners no greater protection than this Eighth Amendment standard. *Whitley v. Albers*, 475 U.S. 312, 326-27 (1986). Next it applied the standard generally to Eighth Amendment conditions-of-confinement cases, and it held that liability

could not be imposed solely because of the presence of objectively inhumane conditions. *Wilson v. Seiter*, 501 U.S. 294, 299-302 (1991). More recently, the Court applied the standard specifically to an inmate's claim that officials had failed to protect him from another inmate's assault, and it also generally defined deliberate indifference. *Farmer v. Brennan*, 511 U.S. 825 (1994). The specific question answered in *Farmer* was whether deliberate indifference requires an official to have disregarded a risk of harm of which he was actually aware (the subjective approach) or instead to have disregarded a risk of which he should have been aware (the objective approach). *Id.* at 828, 836-45. The Court held that the subjective approach is required: "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* at 837.

But the Court in *Farmer* also recognized a third element in the liability determination: the official's failure to take steps to alleviate the risk. Approaching this element from the defendant's standpoint, the Court held that "prison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted." *Id.* at 847 (citations omitted). Given that the issue for decision in *Farmer* was the type of knowledge required, the Court had no cause to explore the boundaries of the reasonable-response element.

The Court has not revisited the response issue since *Farmer*, so the questions of how to evaluate the reasonableness of measures, and what types of measures are reasonable, remain essentially open. *See Brown v. Harris*, 240 F.3d 383, 389 (4th Cir. 2001) ("the Court left open the

question of whether the 'reasonable response' prong of *Farmer* is part of the state of mind requirement or whether it stems from the duty to 'ensure reasonable safety' "); Michael B. Mushlin, 1 *Rights of Prisoners* § 2:7 at 196 (3d ed. 2002) ("While there are clear aspects of the *Farmer* decision, not all questions have been answered by the opinion," including the question of reasonable ameliorative measures); Marjorie Rifkind, Farmer v. Brennan: *Spotlight on an Obvious Risk of Rape in a Hidden World*, 26 Colum. Hum. Rts. L. Rev. 273, 303 (1995) ("The measure for determining the 'reasonableness' of defendants' actions remains ambiguous.").

In this vacuum, some circuit courts, like the one here, have felt free to permit a jury to impose its own conception of what specific measures the officials should have undertaken. *E.g.*, *Gibson v. Washoe County*, 290 F.3d 1175, 1183, 1189-91 (9th Cir. 2002), *cert. denied*, 537 U.S. 1106 (2003) (jury could find that jail's medical staff should have immediately performed evaluation of incoming inmate's mental condition, even though at that time he was "kicking and screaming and fighting," and jail policy permitted delay in evaluation under those circumstances); *Giroux v. Somerset County*, 178 F.3d 28, 33-34 (1st Cir. 1999) (jury could find that shift supervisor should have alerted staff about prisoner's presence in holding cell; "administrative negligence can rise to the level of deliberate indifference"); *Hamilton v. Leavy*, 117 F.3d 742, 747-49 (3d Cir. 1997) (although prison staff committee recommended protective custody for inmate, jury could find that it should have actually placed him in such custody); *Jensen v. Clarke*, 94 F.3d 1191, 1199-1200 (8th Cir. 1996) (although prison staff held individualized prisoner orientation meetings at which

cell assignment could be considered and at which prisoner's correctional evaluation could be made available, jury could find that staff should have met with prisoner earlier, should have considered cell assignments at each meeting, and should have used evaluations at each meeting). In one such case a petition for writ of certiorari is currently pending before this Court. *Cavalieri v. Shepard*, 321 F.3d 616, 622 (7th Cir. 2003), *petition for cert. filed*, 72 U.S.L.W. 3007 (U.S. June 18, 2003) (No. 02-1843) (although officer "was not required to take perfect action or even reasonable action," and although he checked on inmate's welfare and offered to help inmate's mother contact jail staff, jury could find that he should have transmitted mother's information about son to jail staff).

Some circuit courts, to the contrary, have refused to focus on what officials might have done and instead have evaluated what the officials actually did. *E.g., Estate of Ford v. Ramirez-Palmer*, 301 F.3d 1043, 1052-53 (9th Cir. 2002) (guard responded reasonably in assigning two inmates to same cell by relying on his own knowledge of these inmates, even though he violated prison policy by failing to review inmates' files before assigning); *Brown v. Harris*, 240 F.3d 383, 385, 390-91 (4th Cir. 2001) (guard responded reasonably to suicide risk by placing inmate on "medical watch," even though guard failed to remove inmate's shoelaces or have him medically examined); *Liebe v. Norton*, 157 F.3d 574, 576, 578 (8th Cir. 1998) (guard responded reasonably to suicide risk by placing inmate in special cell and checking on him repeatedly, even though he failed to turn on the audio system and had not yet obtained in-person training on suicide prevention); *Bagola v. Kindt*, 131 F.3d 632, 646-48 (7th Cir. 1997) (prison staff responded reasonably to machinery hazards, even though

they "may not have acted as quickly as possible to abate all risks, and they may even have acted negligently"); *Doe v. Welborn*, 110 F.3d 520, 524-25 (7th Cir. 1997) (prison staff responded reasonably to inmate threats by placing threatened inmate in protective custody and then transferring him, even though the transfer did not occur until two months after risk began); *Woods v. Lecureux*, 110 F.3d 1215, 1225 (6th Cir. 1997) (warden responded reasonably when he "continually attempted to improve the prison conditions," although plaintiff inmate's expert testified that warden had failed to monitor knives and had failed to make appropriate decisions on staffing levels).

As these two case lists indicate, a split of authority exists, but rather than being a split between two or even three groups of the circuits, it is a split among and even within individual circuits. *See Mushlin*, *supra*, § 2:7 at 199 ("It is difficult to reconcile all the cases.") This splintering is especially troubling where, as here, officials raise the qualified immunity defense, which "recognizes that officials can act without fear of harassing litigation only if they reasonably can anticipate when their conduct may give rise to liability for damages and only if unjustified lawsuits are quickly terminated." *Davis v. Scherer*, 468 U.S. 183, 195 (1984).

In cases concerning government officials, then, the need for clarification itself tends to make this issue important, and other factors confirm that importance. In such cases, a ruling on liability (including the reasonable-response element) plays a critical role in deciding whether trial should be had at all in the case under consideration, and for subsequent cases this ruling helps to "set forth principles which will become the basis for a holding that a

right is clearly established." *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Moreover, the right of detainees to be free from deliberate indifference toward a substantial risk of serious harm, and the concomitant duty of officials to refrain from such indifference, play a central role in cases involving virtually all governmental custody regimens – not only juvenile pretrial and posttrial detention facilities, but also prisons, jails, and foster care. *See, e.g.*, *Farmer*, *supra* (prison); *City of Canton v. Harris*, 489 U.S. 378 (1989), and *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239 (1983) (adult pretrial detention); *Hill v. DeKalb Regional Youth Detention Center*, 40 F.3d 1176, 1186 (11th Cir. 1994) (juvenile posttrial detention); *Taylor v. Ledbetter*, 818 F.2d 791, 796 (11th Cir. 1987) (en banc), *cert. denied*, 489 U.S. 1065 (1989), and *Doe v. N. Y. C. Dep't of Soc. Svcs.*, 649 F.2d 134 (2d Cir. 1981), *cert. denied,* 464 U.S. 864 (1983) (foster care). One result of the wide applicability of this standard is that, as legal citator services show, *Farmer* has now been construed in thousands of circuit court and district court cases, and its reasonable-response language alone has been applied in hundreds of these cases. *See also Mushlin, supra*, § 2:7 at 181 ("*Farmer* is an important case that has attracted a great deal of scholarly attention.")

Finally, this issue is an important one from a structural standpoint. By limiting officials' legal liability only to conduct that is subjectively culpable, *Farmer* helps to preserve the important principle that "the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial." *Bell v. Wolfish*, 441 U.S. 520, 548 (1979).

What has been said here to show the importance of this issue also goes a long way toward showing the errors in the court of appeals' opinion. In its opinion, the court

concluded that Petitioners could be found liable by a jury because they used ameliorative measures that did not succeed, failed to use particular measures that the court believed might succeed, and thus caused Respondent Mullins's injury. App., *infra*, at 17a-18a, 22a-23a.

This conclusion is erroneous principally for two reasons. First, it contradicts the logical framework of *Farmer*, as well as the holdings in similar cases, by substituting the court of appeals' choices of measures for Petitioners' discretion. Although in *Farmer* this Court had no occasion to decide explicitly the reasonable-response issue, it made comments on other issues that suggest the proper approach. Specifically, it noted that deliberate indifference is to be evaluated with respect to officials' actual perception of the risk ("failure to alleviate a significant risk that he should have perceived but did not" is no basis for deliberate-indifference finding, 511 U.S. at 838), without regard to an ameliorative measure's success (there is no liability where efforts are made, "even if the harm ultimately was not averted," *id.* at 844-45), with deference to the officials' exercise of discretion in choosing the measures (the standard "incorporates due regard for prison officials' 'unenviable task of keeping dangerous men in safe custody under humane conditions,'" *id.*), and with recognition of the existence and scope of the officials' power to control the conditions creating the risk ("to the extent respondents seek affirmance here on the ground that officials . . . had no power to control prison placement . . . though we do not reject respondents' arguments about petitioner's claim for damages, the record does not permit us to accept them as a basis for affirmance," *id.* at 850). These comments are entirely consistent with *Farmer's*

central conclusion – that at the core of deliberate indifference lies a subjective requirement that "isolates those who inflict punishment." *Id.* at 839.

Moreover, these comments are consistent with this Court's earlier conclusions on the proper role of the judiciary in detention cases. In *Bell, supra*, 441 U.S. at 547, the Court held, "Prison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." In *Whitley v. Albers*, 475 U.S. 312, 321 (1986), the Court quoted that passage from *Bell*. Then it held that this deference applies to all detention policies and practices, and that it significantly limits judicial oversight:

> That deference extends to a prison security measure taken in response to an actual confrontation with riotous inmates, just as it does to prophylactic or preventive measures intended to reduce the incidence of these or any other breaches of prison discipline. It does not insulate from review actions taken in bad faith and for no legitimate purpose, but it requires that neither judge nor jury freely substitute their judgment for that of officials who have made a considered choice.

475 U.S. at 322. The Court also stated in *Whitley* that the standard for permitting judicial intervention was "a showing that there was no plausible basis for the officials' belief." *Id.* at 323.

In the present case, then, the problem with the deliberate indifference holding is not that the measures

suggested by the court of appeals are necessarily unreasonable. The real problem is that additional measures can always be imagined, and permitting a court to do so after the fact and without accountability for their implementation simply substitutes judicial discretion for properly vested administrative discretion. This case is a good illustration of this problem, since the measures offered by the court of appeals lie at the heart of administrative discretion. Installing a video camera in the hallway outside Respondent Mullins's room would not have affected the incident, since it occurred inside the room, and installing a camera in each room would be prohibitively expensive and significantly intrusive. *See Mooreman v. Sargent*, 991 F.2d 472, 474 (8th Cir. 1993) (as to homosexual rape, "we do not believe that the Constitution requires a prison to station a full-time guard outside each cell to prevent it from ever occurring").

The second main error in the court of appeals' conclusion on the constitutional-violation issue is intertwined with the first. The court, although finding that the risk of violence was caused by factors outside Petitioners' control (the rise in inmate population and the inadequacy of funding), still held that a jury could find that Petitioners caused Respondent's injury. App., *infra*, at 18a. Neither Petitioner had the legal authority to control admissions or releases at the facility, and neither had the legal authority to control funding for it. Thus, stanching the inflow of inmates, speeding their outflow, and securing more funds did not lie within these officials' authority, and any injury caused by the failure to accomplish these goals cannot fairly be ascribed to them. Moreover, the court's causation determination postponed to the jury trial any consideration of the ameliorative measures that Petitioners actually

used. *Id.* The twin errors of failing to respect Petitioners' discretion and of imputing causation where none existed clearly made a difference in outcome here, given that Petitioners made real efforts, within the bounds of their authority, to ameliorate any risk of harm that they perceived.

II. The Opinion Conflicts with This Court's Decisions On a Fundamental Aspect of Qualified Immunity.

The opinion below conflicts with three of this Court's decisions on the clearly-established-law branch of qualified immunity: *Hope v. Pelzer*, 536 U.S. 730 (2002); *Anderson v. Creighton*, 483 U.S. 635 (1987); and *Saucier v. Katz*, 533 U.S. 194 (2001). On this branch, unlike on the liability branch, the opinion below does not reflect a splintering of circuit court rulings; most of the circuits have followed the three decisions most of the time. This relative conformity does not mean that the opinion below is unique. *See, e.g.*, *Catletti v. Rampe*, 334 F.3d 225 (2d Cir. 2003); *Austin v. Johnson*, 328 F.3d 204, 210 (5th Cir. 2003); *Treats v. Morgan*, 308 F.3d 868, 874 (8th Cir. 2002); *Clement v. Gomez*, 298 F.3d 898, 906 (9th Cir. 2002). But on this issue, this case is important because it plainly contradicts this Court's precedents, and also because – touching both the methodology and the substance of this branch of qualified immunity – its logic potentially affects every government officer performing a discretionary act.

As for methodology, the Eleventh Circuit's utter failure to compare the facts at hand to the facts of prior cases represents both an overreaction to *Hope* and an evasion of *Anderson*. In *Hope*, this Court found that the Eleventh Circuit's requirement that the facts of previous

cases be "materially similar" to those at issue was inconsistent with the "fair notice" standard, because it permitted defendants committing obvious constitutional violations to claim successfully that the law was not clearly established if there was no case squarely on point.

The *Hope* defendants were prison guards who had twice handcuffed the plaintiff inmate to a hitching post; the second time they had kept him handcuffed for seven hours in the sun without a shirt, and they had denied him a bathroom break, given him water only once or twice, and taunted him about his thirst. 536 U.S. at 733-35. In addition to the obvious cruelty of the acts themselves, other rulings and reports notified the guards that such acts were illegal. *Id.* at 737, 742-45. Under those circumstances, this Court found that the absence of a case exactly on point did not deprive the defendants of fair notice that their conduct was unlawful.

The Eleventh Circuit erred in applying that rule to the present case. In *Hope* the guards' conduct clearly "amount[ed] to gratuitous infliction of 'wanton and unnecessary' pain" and thus obviously violated the Constitution, *id.* at 738, while in the present case the putative wrong arose from the cumulative effect of myriad discrete decisions – made by many individuals over many years – about policies and practices relating to budgeting, classifying, monitoring, and other aspects of operating a juvenile detention system. If these administrative decisions transgress the Constitution at all, they certainly fail to violate it at the level of obviousness illustrated in *Hope*. After all, for constitutional liability to attach in a detention-conditions case, an official must act with "obduracy and wantonness, not inadvertence or error in good faith." *Whitley v. Albers*, 475 U.S. 312, 319 (1986); *see*

also, e.g., Daniels v. Williams, 474 U.S. 327, 331 (1986) (the substantive due process guarantee protects against government power arbitrarily and oppressively exercised).

This Court's ruling in *Hope* does not purport to eliminate completely the need for factual similarity between the case under consideration and prior cases; it quotes the opinion in *Anderson, supra*, in explaining that "[f]or a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. . . . " *Hope, supra,* 536 U.S. at 739, quoting *Anderson, supra,* 483 U.S. at 635. And *Anderson* explains how that clarity must be gauged, pointing out that general statements of a rule alleged to be violated are insufficient and that "the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense." 483 U.S. at 639-40; *accord, Saucier, supra*, 533 U.S. at 200 ("the question whether the right was clearly established must be considered on a more specific level than recognized by the Court of Appeals"); *Estate of Ford v. Ramirez-Palmer*, 301 F.3d 1043, 1050-51 (9th Cir. 2002) ("it is not sufficient that *Farmer* clearly states the general rule that prison officials cannot deliberately disregard a substantial risk of serious harm to an inmate").

The Eleventh Circuit omitted this more particularized consideration by simply holding that "a prison administrator violates an inmate's Fourteenth Amendment rights when the administrator recklessly disregards known dangers of inmate-on-inmate violence" and citing three cases. App., *infra*, at 20a. That omission made a decisive difference in outcome, since the cited cases are based on fact patterns that are different in critical respects from

that in the present case. The court exacerbated that omission by also failing to analyze the facts in its own case that is perhaps most similar to the present one, *Hill v. DeKalb Regional Youth Detention Center*, 40 F.3d 1176, 1192-95 (1994), or even its own most recent en banc decision in a failure-to-protect case, *Marsh v. Butler County*, 268 F.3d 1014 (2001).

With respect to the substance of the qualified immunity defense, the Eleventh Circuit's treatment of the clearly-established-law issue not only failed to satisfy the fair notice requirement, but it also failed to acknowledge that the deference provided by the defense goes beyond the discretion built into the constitutional liability standard. The court did so by permitting this case to go forward simply because the jury "could find" the officials liable, without the court's first determining whether Petitioners' understanding of what the Constitution meant for this case was arguably reasonable.

In *Saucier*, *supra*, this Court barred the approach taken in the Eleventh Circuit opinion. There the Court reversed a court of appeals' opinion that permitted postponing the determination of this issue until trial, when the constitutional-liability issue also required determination of the reasonableness of the official's conduct. This Court held that "the ruling on qualified immunity requires an analysis not susceptible of fusion with the question whether unreasonable force was used in making the arrest." 533 U.S. at 197. The reasoning underlying this holding is the Court's acknowledgment that, even when the liability standard includes a reasonableness determination,

> [t]he qualified immunity inquiry, on the other hand, has a further dimension. The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.

533 U.S. at 205. The Eleventh Circuit here failed to address this "further dimension," erroneously leaving for trial the objective reasonableness of Petitioners' perceptions of the law's requirements. This failure and the court's failure to undertake a factual comparison preclude reaching the proper result in the present case and threaten to deny the benefits of the qualified immunity defense in future suits against government officials.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 02-14042

D. C. Docket No. 97-03364 CV-CC-1

TANGIE JUDY,
individually and in her capacity
as mother and Natural Guardian
of D.M., a Child,

Plaintiff-Appellee,

versus

EUGENE P. WALKER,
individually and in his capacity
as Commissioner of the Department
of Juvenile Justice, NATHAN DAVIS,
individually and in his capacity
as Director of the Division of Detention
Centers of the Department of Juvenile Justice,
JESSE ANDREWS,
individually and as the Director of the
Gwinnett Regional Youth Detention Center,

Defendants-Appellants,

TOM COLEMAN, etc., et al.,

Defendants.

Appeal from the United States District Court
for the Northern District of Georgia

(Filed May 30, 2003)

Before: BIRCH, HULL and RONEY, Circuit Judges.

PER CURIAM:

This appeal stems from a § 1983 suit based on the alleged sexual assault of D.M., a then sixteen year-old male, by other juvenile male inmates during his detention at the Gwinnett Regional Youth Detention Center (the "GRYDC") on the evening of March 1, 1996. In this interlocutory appeal, defendants Jesse Andrews, Nathan Davis, and Eugene Walker, all in their individual capacities, appeal the district court's order denying their motion for summary judgment based on qualified immunity. After review and oral argument, we affirm the district court's denial of qualified immunity for defendants Andrews and Davis, and reverse its denial of qualified immunity for defendant Walker.

I. BACKGROUND

A. The GRYDC

The Division of Detention Services of the Georgia Department of Juvenile Justice provides housing for juvenile inmates at twenty Regional Youth Detention Centers throughout the state.[1] Juvenile inmates at these

[1] Because we are reviewing the district court's disposition of a motion for summary judgment, we consider the record in the light most favorable to the non-moving party, here the plaintiff, and recount the facts accordingly. *See Vinyard v. Wilson*, 311 F.3d 1340, 1343 n.1 (11th Cir. 2002). Because we must review the record in the light most favorable to the plaintiff, what we set out in this opinion as "the facts"

(Continued on following page)

facilities are either awaiting adjudication on charges or have been so adjudicated and are awaiting placement in another juvenile detention facility. The GRYDC is located in Lawrenceville, Georgia, and originally was designed to house thirty juveniles: eleven girls and nineteen boys.

On March 1, 1996, the GRYDC was significantly overcrowded. The daily population report for the GRYDC on March 1 listed sixty-seven juveniles, including fifty-four males.[2] Thus, on the day the alleged sexual assault occurred, the GRYDC had thirty-five more male inmates than it was designed to house. Defendant Andrews, the director of GRYDC, described the facility as "severely overcrowded" and noted that the GRYDC typically was operating at 300% capacity with respect to male inmates.

Depending on the daily population levels and the offenses committed by those juveniles in detention, as many as four males would be housed together in an approximately eight foot by eight foot room. Although there were juvenile classification standards in place, including a priority list of offenders who should be assigned to single rooms, the overcrowding at the GRYDC (and other RYDCs around the state) forced RYDC staff to deviate from the classification system.

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for summary judgment purposes may not be the actual facts. *See Swint v. City of Wadley*, 51 F.3d 988, 992 (11th Cir. 1995).

[2] Although there is some dispute regarding whether the number of juveniles who stayed overnight on March 1, 1996 was sixty or sixty-seven, the dispute is immaterial; either number is more than double the design capacity of the GRYDC.

Further complicating the situation, the GRYDC was understaffed significantly. The night that D.M. allegedly was sexually assaulted, there were only three staff members on duty to monitor the sixty-seven juvenile inmates housed at the facility. Furthermore, because of past inmate attacks on staff, including multiple inmates ganging up on a single staff member, staff members were not permitted to enter a juvenile's room in the evening without a police officer present.[3] Thus, even if a staff member witnessed a violent inmate-on-inmate attack or sexual assault, the staff member was required to wait for police officers before attempting to stop the assault. Typically, it would take police officers fifteen to thirty minutes to arrive at the GRYDC.

In addition to minimal staffing, no effective monitoring procedures existed. While the girls' wing of the GRYDC had a surveillance camera to monitor the hall in that part of facility, there were no cameras in the girls[']] rooms. There was no similar surveillance camera in place at all in the hall or rooms of the boys' wing. The only means by which the nineteen boys' rooms could be monitored was by a staff member making rounds, which further was complicated by the small size of the windows in the door of each room, or via an intercom system in each room connected to a central control room.

The juvenile inmates, however, adopted methods to neutralize the efficacy of these monitoring measures. To circumvent the scrutiny of the staff member rounds, the

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[3] The only exception to this rule was if a juvenile was committing suicide.

male inmates would prematurely terminate an assault when they heard the door to the wing open. The small windows in the room doors also made it difficult for the staff member to see the entire room. To neutralize the in-room intercom, they would apply wet toilet paper to the intercom microphone to prevent any audio from reaching the control room.

B. Prior Incidents of Inmate-on-Inmate Violence at the GRYDC

The overcrowding and lack of supervision directly contributed to an atmosphere of violence that permeated the GRYDC. Prior to the sexual assault against D.M., there were numerous recent incidents of inmate-on-inmate violence at the GRYDC. In the one-year period prior to the sexual assault on D.M. on March 1, 1996, there were eighty-four incidents of inmate-on-inmate violence, including four instances of inmate-on-inmate sexual assault.

Specifically, on July 28, 1995, a juvenile male forced another juvenile male to put his mouth on his penis and to masturbate him. One month later, on August 31, 1995, Youth Detention Workers discovered that two male juveniles systematically tortured another male juvenile over a number of days, including sodomizing him with a toothbrush. Then, on December 28, 1995, a male juvenile was charged with physically and sexually assaulting a female juvenile. Less than three weeks after that incident, on January 16, 1996, a male juvenile sexually assaulted another male juvenile, forcing the victim to masturbate him, anally sodomizing the victim, and attempting to force the victim to perform oral sex. In addition to these four incidents in the year prior to the assault on D.M., on

October 8, 1994, two juvenile males attempted to overpower another juvenile male to have sex with one of them. Further investigation regarding this incident revealed that the two assailants also repeatedly had been engaging in sexual acts with each other.

C. Defendants Andrews, Davis, and Walker

Defendants Andrews, Davis, and Walker all were officers and employees of the Georgia Department of Juvenile Justice at the time of D.M.'s alleged sexual assault. At that time, Andrews was the director of the GRYDC. Davis was the director of the Division of Detention Services. Walker was the Commissioner of Juvenile Justice. These three defendants effectively represent consecutive links in the chain of command within the Department of Juvenile Justice: Andrews reported to Davis, who reported to a Deputy Commissioner of Juvenile Justice, who reported to Walker. As such, their respective involvement with the incident in this case varies greatly.

1. Jesse Andrews

As director of the GRYDC, Andrews was responsible for overseeing the daily operations of the GRYDC, including supervising and training staff members. In that regard, Andrews designed and implemented policies regarding everything from staff supervision of juveniles and monitoring requirements to the number of juveniles allowed to participate in recreational activities at any given time. Andrews also established routine monitoring procedures for both the girls' and boys' wings. Furthermore, Andrews had ultimate decision-making authority regarding the classification of and housing assignments

for detained juveniles at the GRYDC, and he attempted to comply with Davis' classification standards as best as possible given the overcrowded conditions.

As director of the GRYDC, Andrews was the primary provider of information to the Division of Detention Services. Andrews was required to submit a monthly action plan to defendant Davis addressing key areas of operation, including any problems associated therewith and a course of action to correct the reported problems. Andrews also was responsible for filling out the Department of Children and Youth Services Special Incident Reports, which provide details regarding incidents of inmate-on-inmate violence, including sexual violence. These Special Incident Reports include information regarding the people involved [sic] the incident, the nature of the incident, the extent of injuries and course of treatment, and any remedial course of action. Each Special Incident Report is faxed from Andrews to Davis.

2. Nathan Davis

As the director of the Division of Detention Services, Davis was responsible for overseeing the operation of the twenty Regional Youth Detention Centers located throughout the State of Georgia, including the GRYDC. To facilitate his oversight of the detention centers, Davis required that each facility director transmit to him each weekday a report of current juvenile population. Davis then would amass a daily statewide population report that was distributed to key Department of Juvenile Justice officials, including Commissioner Walker. Furthermore, Davis was aware of the general conditions at the GRYDC because he visited the facility on a monthly basis.

In addition to receiving daily reports regarding the population of the GRYDC from its facility director, Davis received monthly statistical summaries indicating the number of incidents of inmate-on-inmate violence, as well as inmate-on-staff violence. Davis also received copies of the Special Incident Report Forms that Andrews filled out after each major incident of violence at the GRYDC. Thus, Davis received detailed information on incidents of inmate-on-staff assaults, inmate-on-inmate assaults, and inmate-on-inmate sexual assaults. Indeed, Davis received detailed descriptions of the inmate-on-inmate sexual assault in October 1994 and also of the four sexual assaults in the year preceding D.M.'s sexual assault on March 1, 1996.

3. Eugene Walker

As Commissioner, Walker was responsible for promulgating policy and direction for the management of all unruly and delinquent youth committed to the State of Georgia. Walker's duties were not specific to one Regional Youth Detention Center; rather, his focus was on the statewide overcrowding problems. Walker was responsible for the formulation of statewide action plans to alleviate overcrowding statewide, including lobbying the state legislature for funding on behalf of the Department of Juvenile Justice.

Additionally, there was an administrative layer between Walker and Davis. Davis did not report directly to Walker, but instead reported to one of the deputy commissioners of the Department of Juvenile Justice. Furthermore, Walker visited the GRYDC, at most, once a year. In

fact, Walker was detached administratively from the GRYDC and its operations.

D. D.M.'s Detention at the GRYDC

D.M. was adjudicated by the Gwinnett County Juvenile Court as "unruly" in October 1995.[4] The basis of the charge was destroying property, running away from home, and other disruptive behavior. After being adjudicated, he was placed on probation and continued to live with his mother and stepfather. In February 1996, D.M. violated

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[4] Georgia law defines an unruly juvenile as a child who:

(A) While subject to compulsory school attendance is habitually and without justification truant from school;

(B) Is habitually disobedient of the reasonable and lawful commands of his or her parent, guardian, or other custodian and is ungovernable;

(C) Has committed an offense applicable only to a child;

(D) Without just cause and without the consent of his or her parent or legal custodian deserts his or her home or place of abode;

(E) Wanders or loiters about the streets of any city, or in or about any highway or any public place, between the hours of 12:00 Midnight and 5:00 A.M.;

(F) Disobeys the terms of supervision contained in a court order which has been directed to such child, who has been adjudicated unruly; or

(G) Patronizes any bar where alcoholic beverages are being sold, unaccompanied by such child's parents, guardian, or custodian, or possesses alcoholic beverages; and

(H) In any of the foregoing, is in need of supervision, treatment, or rehabilitation; or

(I) Has committed a delinquent act and is in need of supervision, but not of treatment or rehabilitation.

O.C.G.A. § 15-11-2(12).

the conditions of his probation by testing positive for marijuana. The Juvenile Court revoked D.M.'s probation, and he was sent to the GRYDC for thirty days on February 26, 1996.

Upon arrival at the GRYDC, D.M. was assigned to a residential room with two boys. He was transferred from that room because the boys continually engaged in horseplay, including throwing magazines at each other. D.M. was moved to a room with younger, smaller youth. Because D.M. and the boy in the second room did not get along, D.M. was transferred to a third room on March 1, 1996.

In this third room, D.M. was placed with three other inmates, two of which were being detained on violent crime charges.[5] His first night in the room, D.M. was physically and sexually assaulted by the other roommates. The three roommates beat D.M. and forced him to perform oral sex on them.

The day after being sexually assaulted, D.M. reported the incident to one of the GRYDC staff members, who then reported the incident to Defendant Andrews. In turn, Andrews notified Defendant Davis, who requested that the Department of Juvenile Justice's Office of Law Enforcement Services conduct an investigation. On Andrew's [sic] instruction, D.M. was separated from the assailants and

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[5] The parties disagree as to the actual charges against the two juveniles charged with violent crimes. Their dispute is insignificant in that both parties agree that they were charged with violent offenses in sharp contrast to D.M.'s detention based on violation of parole stemming from an unruly behavior adjudication.

sent for medical treatment and evaluation. The hospital documented bruises on his body, but a mouth culture did not indicate any oral sexual contact.[6] The three juveniles who assaulted D.M. were transferred to other RYDCs, and D.M. was placed in another residential room upon his return to the GRYDC, where he served the remainder of his thirty-day detention. He was released on March 27, 1996.

E. Procedural History

In October 1997, D.M.'s mother, Tangie Judy, filed this 42 U.S.C. § 1983 action on D.M.'s behalf in the State Court of Fulton County. The defendants subsequently removed the case to federal district court on November 6, 1997. The defendants' first motion for summary judgment based on sufficiency of the evidence was denied on January 12, 2000. In their appeal of the first denial of summary judgment, the defendants argued that they were entitled to qualified immunity. In an unpublished opinion, this Court affirmed the denial of summary judgment because the defendants' qualified immunity argument was new on appeal.[7] *Judy v. Walker,* No. 00-10753 (11th Cir. filed Dec. 5, 2000).

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[6] D.M. contends that the negative results from the mouth culture were caused by his having brushed his teeth earlier in the morning.

[7] In that opinion, this Court noted that we had jurisdiction to hear the appeal because the district court determined in a footnote that the appellants were not entitled to qualified immunity. We also determined that the district court should not have ruled on qualified immunity because the issue was not before it and affirmed the denial of summary

(Continued on following page)

Subsequently, the defendants filed their second motion for summary judgment on November 13, 2001, raising the defense of qualified immunity. The district court denied the defendants' motion for summary judgment on July 8, 2002. The defendants filed this interlocutory appeal on July 22, 2002.[8]

II. QUALIFIED IMMUNITY

"The defense of qualified immunity completely protects government officials performing discretionary functions from suit in their individual capacities unless their conduct violates 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Gonzalez v. Reno,* 325 F.3d 1228, 1233 (11th Cir. 2003) (quoting *Hope v. Pelzer,* 122 S.Ct. 2508, 2515 (2002)); *Vinyard v. Wilson,* 311 F.3d 1340, 1346 (11th Cir. 2002). "The purpose of this immunity is to allow government officials to carry out their discretionary duties without the fear of personal liability or harassing litigation" by ensuring that only "the plainly incompetent or one who is knowingly violating the federal law" are subjected to liability. *Vinyard,* 311 F.3d at 1346. To receive qualified immunity, a government official first must "prove that he

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judgment without prejudice to the appellant's right to seek summary judgment on qualified immunity grounds.

[8] The denial of qualified immunity on a motion for summary judgment is an appealable interlocutory order. *See Mitchell v. Forsyth,* 472 U.S. 511, 530 (1985).

was acting within his discretionary authority." *Gonzalez*, 325 F.3d at 1234 (citing *Vinyard*, 311 F.3d at 1346).[9]

Once a defendant establishes that he was acting within his discretionary authority, the burden shifts to the plaintiff to show that the defendant is not entitled to qualified immunity. *Vinyard*, 311 F.3d at 1346. The Supreme Court has articulated a two-part test to determine the applicability of qualified immunity. "The threshold inquiry a court must undertake in a qualified immunity analysis is whether [the] plaintiff's allegations, if true, establish a constitutional violation." *Hope*, 122 S. Ct. at 2513. If, under the plaintiff's allegations, the defendants would have violated a constitutional right, "the next, sequential step is to ask whether the right was clearly established." *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

The plaintiffs in this case, however, have sued two types of defendants who may be entitled to qualified immunity. The plaintiffs have sued defendant Andrews, the director of the GRYDC. As director of the GRYDC, defendant Andrews is entitled to qualified immunity unless the record indicates that he violated a constitutional right that was clearly established at the time of the violation. *See Vinyard*, 311 F.3d at 1346. The plaintiffs additionally have sued Andrews's supervisors, defendants Davis and Walker. Defendants Davis and Walker are entitled to qualified immunity unless the plaintiffs show a basis greater than respondeat superior for holding the defendants liable. *See Cottone v. Jenne*, 326 F.3d at ___,

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[9] In this case, it is clear and undisputed that defendants Andrews, Davis, and Walker were acting within their discretionary authority.

2003 WL 1860522, at *6 (11th Cir. 2003) (concluding that supervisory officials cannot be held liable based on respondeat superior, but instead only where the supervisor "personally participates in the alleged unconstitutional conduct or when there is a causal connection between the actions of a supervising official and the alleged constitutional deprivation.").

III. DEFENDANT ANDREWS

We first determine whether defendant Andrews is entitled to qualified immunity.[10]

A. Constitutional Violation

On appeal, the plaintiffs contend that, for summary judgment purposes, the record establishes that defendant Andrews violated D.M.'s Fourteenth Amendment right to be free from violence at the hands of other inmates.[11] "A

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[10] We review *de novo* a district court's order granting summary judgment. *Vinyard*, 311 F.3d at 1346 n.7 (citing *Lee v. Ferraro*, 284 F.3d 1188, 1190 (11th Cir. 2002)). Summary judgment is appropriate only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The court ruling on a motion for summary judgment must take into account "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any[ ] in the light most favorable to the party opposing the motion." *Id.* at 323.

[11] The plaintiffs correctly assert that because D.M. was detained in a juvenile detention facility rather than a convicted prisoner's institution at time of the incident, the relevant constitutional guarantee is not the Eighth Amendment's prohibition against cruel and unusual punishment, but rather the Due Process Clause of the Fourteenth Amendment. *See Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977).

(Continued on following page)

prison official's deliberate indifference to a known, substantial risk of serious harm to an inmate violates the [Fourteenth] Amendment." *Marsh v. Butler County*, 268 F.3d 1014, 1028 (11th Cir. 2001) (*en banc*). A Fourteenth Amendment violation occurs when a substantial risk of serious harm, of which the official is subjectively aware, exists and the official does not respond reasonably to the risk. *Id.* Such risk must be an objectively substantial risk of serious harm to prisoners, and the prison official must respond to that risk in an objectively unreasonable manner. *Farmer v. Brennan,* 511 U.S. 825, 834, 844-845 (1994). Finally, a plaintiff must show that the constitutional violation caused the injury. *Marsh,* 268 F.3d at 1028.

The plaintiffs produced evidence that inmate-on-inmate violence occurred with unacceptable frequency at the GRYDC due to overcrowding. In the twelve months prior to D.M.'s sexual assault, there were eighty incidents of inmate-on-inmate violence. In the five months prior to D.M.'s assault there were three separate instances of inmate-on-inmate sexual assault. In fact, conditions at the GRYDC were considered dangerous enough that staff were told, as a matter of policy, not to enter a room housing juveniles at night without police protection.

Furthermore, due to the overcrowded conditions, proper inmate classification and segregation were impossible. D.M., who was being detained due to a parole

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We previously have stated, however, that "the standard for providing basic human needs to those incarcerated or in detention is the same under both the Eighth and Fourteenth Amendments." *Marsh*, 268 F.3d at 1024 n.5.

violation stemming from a *non-violent unruliness adjudication,* was assaulted by his roommates, who were being detained on *violent felony charges.* There also was an insufficient number of staff members to monitor the juveniles, and the monitoring equipment in the rooms easily could be disabled. A jury viewing this evidence and all reasonable inferences therefrom in the light most favorable to the plaintiff reasonably could find that a substantial risk of serious harm existed at the GRYDC.

Nevertheless, the plaintiffs also must establish that Andrews was deliberately indifferent to this substantial risk of serious harm. The plaintiffs are required to show that Andrews subjectively knew of the substantial risk of serious harm and that he "disregard[ed] that risk by failing to take reasonable measures to abate it." *Farmer,* 511 U.S. at 834. In making this showing, the plaintiffs "are not required to show that [Andrews] knew precisely who would attack whom, but only that [Andrews] had subjective knowledge of a generalized, substantial risk of serious harm from inmate violence." *Hale v. Tallapoosa County,* 50 F.3d 1579, 1583 (11th Cir. 1995) (internal quotation marks and citation omitted).

Here, there is evidence in the record indicating that Andrews subjectively knew of the frequently occurring inmate-on-inmate violence and the substantial risk of serious harm to D.M. As director, Andrews compiled monthly statistical reports containing the number of inmate-on-inmate assaults in the GRYDC. He also was responsible for filling out the Special Incident Report Forms containing details of each assault that occurred at the facility. In the five months preceding D.M.'s assault, Andrews filled out three separate Special Incident Report Forms containing allegations of inmate-on-inmate sexual

assault. Furthermore, memoranda written by Andrews to Department of Juvenile Justice officials, including to defendant Davis, expressed his concern over the violence resulting from the overcrowding at the GRYDC. Thus, there is sufficient evidence to allow a jury reasonably to conclude that Andrews subjectively knew of the substantial risk of serious harm to D.M.

Knowledge of a substantial *risk* of serious harm, however, is insufficient to show deliberate indifference. The plaintiffs also are required to show that Andrews disregarded the risk by failing to take steps to abate it. *Farmer,* 511 U.S. at 834. Andrews argues that he took the following steps to reduce the substantial risk of violence at the GRYDC: (1) releasing low risk juveniles to reduce overcrowding; (2) requiring staff to intervene in inmate disputes before the disputes became violent; (3) having the night staff walk down the hallways every half hour; (4) installing an intercom system in each room that was connected to the central control room; and (5) attempting to segregate inmates based on violent tendencies.

The problem with each of these remedial measures, however, is that Andrews also knew that none of these steps had any significant impact on the substantial risk of inmate-on-inmate violence at the GRYDC. On the date of D.M.'s assault, the GRYDC still had thirty-five more male juvenile inmates than it was designed to house. The juvenile inmates easily were able to circumvent the monitoring systems that Andrews put in place, including disabling the intercom system. Moreover, the overcrowding made it impossible for Andrews to adhere to the juvenile classification system. D.M., a non-violent juvenile adjudicated on an unruly charge, was placed in a room with two males charged with violent felonies.

Moreover, despite Andrews's efforts, incidents of inmate-on-inmate violence at the GRYDC continued. Andrews took no further measures to curb the incidents of inmate-on-inmate violence when it became reasonably apparent that the current methods in place were ineffective. For example, to forestall sexual conduct in the girls' wing, Andrews installed a video surveillance system in the hall of the girls['] wing, yet no similar system was installed on the boys' wing or in the boys' rooms. Thus, a jury reasonably could find that Andrews disregarded the substantial risk of serious harm to D.M. by failing to take additional steps to curtail inmate-on-inmate violence where previous measures had failed.

Furthermore, the impetus of the substantial risk of serious harm due to violence at the GRYDC was the combination of a steady stream of juvenile offenders from the juvenile court system and Andrews' inability to secure funding for additional beds at the GRYDC *prior to the assault at issue in this case.* Indeed, on numerous occasions Andrews pointed to the GRYDC's "severe overcrowding" as a significant contributor to the violent conditions at the GRYDC.

While Andrews's efforts to curtail the flow of offenders from the court system, including conducting a meeting with Gwinnett County Juvenile Court judges, and his efforts to securing funding for additional space at the GRYDC "would appropriately be considered by a jury determining whether [Andrews] was deliberately indifferent, such efforts would not necessarily absolve him or [his supervisors] of liability." *Hale v. Tallapoosa County,* 50 F.3d 1579, 1584 (11th Cir. 1995). "A jury could find that despite any efforts [Andrews] made toward construction of [additional rooms or reduction in the flow of juveniles to

the GRYDC], [he] was deliberately indifferent by disregarding 'alternative means' or interim measures for reducing the risk of violence." *Id.* (citing *LaMarca v. Turner,* 995 F.2d 1526, 1536 (11th Cir. 1993). While consideration of alternatives available to Andrews "comes perilously close to second-guessing the difficult choices that [he, as director,] must face," *LaMarca,* 995 F.2d at 1538, such consideration "directly addresses the question of whether monetary restraints frustrated [Andrews's] good faith efforts, or whether he knowingly or recklessly disregarded solutions within his means." *Id.* This question, a jury must decide.

B. Clearly Established Law

Having concluded that there is sufficient evidence in the record that defendant Andrews's conduct amounted to a constitutional violation, we next determine whether preexisting law clearly established that Andrews's conduct amounted to a constitutional violation. *Cottone,* 326 F.3d at ___, 2003 WL 1860522, at *5; *Vinyard,* 311 F.3d at 1349 ("Because [the defendant]'s conduct violated a constitutional right, the next question is whether that constitutional right was 'clearly established' at the time of the violation."). "'The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" *Vinyard,* 311 F.3d at 1350 (quoting *Saucier,* 533 U.S. at 202). In making this inquiry, "the salient question . . . is whether the state of the law . . . gave [the defendants] fair warning that their alleged [conduct] was unconstitutional." *Hope,* 122 S. Ct. at 2516.

At the time of D.M.'s assault, the law in this Circuit was clearly established that a prison administrator violates an inmate's Fourteenth Amendment rights when the administrator recklessly disregards known dangers of inmate-on-inmate violence. Indeed, prior to the March 1, 1996 incident at issue here, there is [sic] at least one case from the United States Supreme Court and two cases from this Circuit so concluding. *See Farmer,* 511 U.S. at 834 (concluding that a prison official violates the Eighth Amendment when he is deliberately indifferent to a substantial risk of serious harm); *Hale*[,] 50 F.3d at 1583-84 (same); *LaMarca,* 995 F.2d at 1535-36 (same). Thus, the district court did not err in determining that defendant Andrews is not entitled to qualified immunity.

IV. Supervisory Liability of Defendants Davis and Walker

That defendant Andrews violated D.M.'s Fourteenth Amendment rights does not establish automatically a claim against defendants Davis and Walker. "It is well established in this Circuit that supervisory officials are not liable under § 1983 for the unconstitutional acts of their subordinates on the basis of respondeat superior or vicarious liability." *Cottone v. Jenne,* 326 F.3d at ___, 2003 WL, at *6 (11th Cir. 2003) (quoting *Hartley v. Parnell,* 193 F.3d 1263, 1269 (11th Cir. 1999)); *Gonzalez,* 325 F.3d at 1234 (concluding supervisory officials are not liable under § 1983 on the basis of respondeat superior or vicarious liability).

"Instead, supervisory liability under § 1983 occurs either when the supervisor personally participates in the alleged unconstitutional conduct or when there is a causal

connection between the actions of a supervising official and the alleged constitutional deprivation." *Cottone,* 326 F.3d at ___, 2003 WL 1860522, at *6; *Gonzalez,* 325 F.3d at 1234-35; *Brown v. Crawford,* 906 F.2d 667, 671 (11th Cir. 1990). "The necessary causal connection can be established 'when a history of widespread abuse puts the responsible supervisor on notice of the need to correct the alleged deprivation, and he fails to do so.'" *Cottone,* 326 F.3d at ___, 2003 WL 1860522, at *6 (quoting *Braddy v. Fla. Dep't of Labor & Employment,* 133 F.3d 797, 802 (11th Cir. 1998)); *Brown,* 906 F.2d at 671. Alternatively, the causal connection may be established when a supervisor's "'custom or policy . . . result[s] in deliberate indifference to constitutional rights'" or when facts support "an inference that the supervisor directed the subordinates to act unlawfully or knew that the subordinates would act unlawfully and failed to stop them from doing so." *Gonzalez,* 325 F.3d at 1234-35 (quoting *Rivas v. Freeman,* 940 F.2d 1491, 1495 (11th Cir. 1991)); *Hartley,* 193 F.3d at 1263; *see also Post v. City of Ft. Lauderdale,* 7 F.3d 1552, 1560-61 (11th Cir. 1993). "'The standard by which a supervisor is held liable in [his] individual capacity for the actions of a subordinate is extremely rigorous.'" *Cottone,* 326 F.3d at ___, 2003 WL 1860522, at *4 (citing *Gonzalez,* 325 F.3d at 1234).

A. Defendant Davis

1. Supervisory Liability

We conclude that the record indicates the necessary causal connection between defendant Davis and the violation of D.M.'s constitutional rights. The repeated acts of inmate-on-inmate violence at the GRYDC due to its overcrowding constitutes "a history of widespread abuse

[that should have] put[ ] [defendant Davis] on notice of the need to correct" the increasing violence. *Cottone,* 326 F.3d at ___, 2003 WL 1860522, at *6 (citation omitted). There were eighty-four incidents of inmate-on-inmate violence in the twelve month period prior [to] the sexual assault on D.M. There also were three incidents of inmate-on-inmate sexual assault in the five months prior to the assault at issue in this case and 4 incidents in the year prior. These repeated incidents of inmate-on-inmate assault over time at the GRYDC provided ample indicia of a need to reduce the violence.

Furthermore, Davis was aware of the repetitious violence at the GRYDC. Davis was aware of the severe overcrowding at the GRYDC and the violent incidents that stemmed from the overcrowding and the resulting inability to house inmates properly. Andrews filled out monthly reports indicating the number of incidents of inmate-on-inmate violence and forwarded them to Davis. Andrews also filled out Special Incident Report Forms each time there was a serious inmate-on-inmate violence incident. These reports also were forwarded to Davis.

Although defendant Davis was aware of the overcrowding and the resulting increased violence, he argues that he took reasonable measures to curtail the incidents of inmate-on-inmate violence. These steps included transferring juveniles to alleviate overcrowding and implementing inmate classification systems to ensure proper housing.

However, by the time D.M. was assaulted, it should have been obvious to defendant Davis that these remedial measures were either ineffective in reducing the severe

overcrowding at the GRYDC or were unable to be implemented due to the severe overcrowding. Thus, these measures had little impact on the substantial risk of serious harm from inmate-on-inmate violence and effectively constituted a non-response to the violence.

Again, the severe overcrowding at the GRYDC was the main contributor to the substantial risk of serious harm from violence at issue in this case, and a lack of funding for additional beds for juvenile offenders may have impeded Davis's ability to alleviate the violence. As was the case regarding defendant Andrews, such factors "would appropriately be considered by a jury determining whether [Davis] was deliberately indifferent, such efforts would not necessarily absolve him of liability." *Hale,* 50 F.3d at 1584. "A jury could find that despite any efforts [Davis] made toward construction of [additional rooms at the GRYDC], [he] was deliberately indifferent by disregarding 'alternative means' or interim measures for reducing the risk of violence." *Id.* (citing *LaMarca,* 995 F.2d at 1536). While consideration of alternatives available to Davis "comes perilously close to second-guessing the difficult choices that [he, as director,] must face," *LaMarca,* 995 F.2d at 1538, such consideration "directly addresses the question of whether monetary restraints frustrated [Davis's] good faith efforts, or whether he knowingly or recklessly disregarded solutions within his means." *Id.*

Accordingly, the record indicates a sufficient causal connection between defendant Davis and the violation of D.M.'s Fourteenth Amendment rights. Thus, there is a cognizable supervisory liability claim against defendant Davis.

2. Clearly Established Law

As discussed in the context of defendant Andrews, we next determine whether preexisting case law clearly establishes that the conduct at issue in this case amounts to a constitutional violation. *See Vinyard,* 311 F.3d at 1349. As stated above, at the time D.M. was assaulted, the law in this Circuit was clearly established that a prison administrator violates an inmate's Fourteenth Amendment rights when he recklessly disregards known dangers of inmate-on-inmate violence. *Farmer,* 511 U.S. at 834 (concluding that a prison official violates the Eighth Amendment when he is deliberately indifferent to a substantial risk of serious harm); *Hale*[,] 50 F.3d at 1583-84 (same); *LaMarca,* 995 F.2d at 1535-36 (same). Thus we conclude that the district court correctly determined that defendant Davis is not entitled to qualified immunity.

B. Defendant Walker

In contrast to defendant Davis, the record is insufficient to establish a causal connection between defendant Walker and D.M.'s constitutional violation. There is insufficient evidence in the record to indicate that defendant Walker had sufficient notice of events at the GRYDC to be held liable for defendant Andrews's actions. *See Cottone,* 326 F.3d at ___, 2003 WL 1860522, at *6.

As the Commissioner of Juvenile Justice for the entire state of Georgia, Walker was more removed from the day-to-day events at the GRYDC. There is no evidence in the record indicating that Walker received the detailed incident reports documenting the incidents of sexual assault and inmate-on-inmate violence at the GRYDC, which reports Davis received. Indeed, there is another Deputy

Commissioner of Juvenile Justice in the chain of command between Walker and Davis. Wile Walker may have received general information regarding the overcrowding of the GRYDC in the context of the statewide overpopulation problem, his relatively recent appointment to the post of Commissioner[12] coupled with his removal from the daily operations of the GRYDC make his role, if any, in the constitutional violation in this case too tangential to impose liability. Thus, the district court erred in denying qualified immunity for defendant Walker.[13]

V. CONCLUSION

For the foregoing reasons, we affirm the district court's denial of qualified immunity as to defendants Andrews and Davis and reverse the district court's denial of qualified immunity as to defendant Walker.

AFFIRMED IN PART; REVERSED IN PART.

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[12] Walker was appointed Commissioner of Juvenile Justice in January 1995.

[13] Because the record is insufficient to establish a constitutional violation by defendant Walker, we need not reach the "clearly established law" prong of the qualified immunity inquiry with respect to defendant Walker. *See Vinyard,* 311 F.3d at 1346 ("If a constitutional right would have been violated under the plaintiff's version of the facts, the *next, sequential step* is to ask whether the right was clearly established.") (internal quotation marks and citation omitted) (emphasis added).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

TANGIE JUDY and DANNY MULLINS,	*	
Plaintiffs,	*	
vs.	*	CIVIL ACTION NO.
EUGENE P. WALKER, NATHAN DAVIS, and JESSE ANDREWS,	*	1:97-cv-3364-CC
Defendants.	*	

ORDER

(Filed Jul. 8, 2002)

Defendants' Second Motion for Summary Judgment is presently before this Court, which has previously found that there are issues of fact with respect to whether defendants were deliberately indifferent to a serious risk of harm at the Gwinnett Regional Youth Detention Center (GRYDC) and whether this indifference resulted in the assault upon plaintiff Mullins. This Court now holds that the law was clearly established that defendants had a duty to protect plaintiff Mullins from violence at the hands of other youth at the GRYDC.

For this reason, Defendants' Second Motion for Summary Judgment is DENIED.

It is SO ORDERED this 8th day of July, 2002.

/s/ Clarence Cooper
CLARENCE COOPER
UNITED STATES DISTRICT
JUDGE

Prepared by:

/s/ David L. Whitman
David L. Whitman
Attorney for plaintiffs
756293

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Plaintiffs,	*	
vs.	*	CIVIL ACTION NO.
EUGENE P. WALKER, NATHAN DAVIS, and JESSE ANDREWS,	*	1:97-cv-3364-CC
Defendants.	*	

ORDER

(Filed Jan. 18, 2000)

Pending before the Court in this action brought pursuant to 42 U.S.C. § 1983 is Defendants' Motion for Summary Judgment [49-1].[1]

I. BACKGROUND

On March 1, 1996, Plaintiff Tangie Judy's then sixteen year old child, Danny Mullins ("Mullins"),[2] was a detainee at the Gwinnett Regional Youth Detention

[1] Plaintiffs' Motion to File Response to Defendants' Reply on Summary Judgment [56-1] is GRANTED.

[2] This action was originally brought by Judy in her capacity as the mother and natural guardian of Mullins. However, when Mullins reached the age of majority, this Court permitted Mullins to be added as a plaintiff.

Center ("GRYDC") as an unruly child.[3] On the evening of March 1st, Mullins was confined in an approximately eight feet by eight feet room with three other children, two of whom were being held on armed robbery charges.[4] The decision to place Mullins in this room was made by a Youth Development Worker ("YDW") at the GRYDC. While being detained in this room, Mullins was beaten and possibly sexually assaulted by the three other children. Mullins reported the assault to a YDW at GRYDC the following morning. Mullins' allegations were then reported to defendant Jesse Andrews ("Andrews"), the Director of the GRYDC. Andrews directed the workers at GYRDC to separate the alleged perpetrators and to send Mullins for treatment and rape evaluation. Mullins also wrote a statement concerning the incident, and statements were taken from each of the alleged perpetrators. Andrews then notified defendant Nathan Davis ("Davis"), the director of the Division of Detention Centers for the Department of Juvenile Justice ("DJJ"), who requested that the DJJ's Office of Law Enforcement Services conduct an investigation.[5] After an investigation, affidavits for

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[3] Mullins was admitted to the GRYDC on February 26, 1996[,] after he violated his probation by failing a drug test for marijuana. Mullins was on probation because he had been adjudicated as unruly by the Gwinnett County Juvenile Court for destroying property, running away from home, and other unruly behavior.

[4] Defendants state that one of the boys was being held as a runaway and on a charge of aggravated assault, rather than armed robbery.

[5] As the director of the Division of Detention Services, Davis was responsible for providing direct supervision to the 20 Regional Youth Detention Centers ("RYDCs") across the State of Georgia. Davis avers that the function of the RYDCs is to provide secure detention for youths who are awaiting adjudication by the juvenile courts as unruly or

(Continued on following page)

arrest warrants were executed against the three perpetrators on the charge of aggravated sodomy. The three were never indicted however, but they were transferred to other detention centers. Mullins completed his detention at GRYDC, and was released on March 27, 1996.

The GRYDC is designed to hold 30 children. On the day that Mullins was beaten, however, 67 children were being detained at the GRYDC, with only two adults present to supervise all of the children at the center. According to Davis, the population of the various RYDCs was a matter of daily concern for him and his staff. Each RYDC director transmitted a report of the current population to him each weekday, and he in turn generated a division-wide population report that was transmitted each weekday to defendant Eugene Walker ("Walker"), then the Commissioner of the DJJ, as well as other DJJ officials. While the defendants were aware that the GRYDC (as well as other of the RYDCs) was overcrowded at the time of Mullins' assault, they aver that they and their staff were using every available measure to reduce the facilities' population, including transferring youths to other RYDCs or releasing low-risk residents. Walker also avers that he requested increased funding for the DJJ in order to expand the capacity of the RYDCs, add staff, and increase the number of alternatives to detention. In response to this request, the General Assembly increased the 1995-1996 fiscal year appropriation for the DJJ as a whole by more than $38 million, or 42% over the preceding

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delinquent youths, or who are awaiting transfer to long-term facilities or other placements following adjudication.

year, and increased the appropriation for the RYDCs by approximately $7 million or 34 percent.

Andrews and Davis were aware that children at the GRYDC have been physically and sexually assaulted at the facility both prior to and after the assault on Mullins. In fact, during the two years preceding Mullins' assault, there were approximately 157 student-on-student assaults and 32 student-on-staff assaults at the facility.[6] Davis avers that he attempted to reduce the physical and sexual assaults at the facility by setting priorities for the placement of detainees based upon the nature of their offenses. Andrews states that he and his staff made substantial efforts to try to prevent these assaults, including requiring that a staff member be present when the youths were out of their rooms and requiring a staff member to check on the residents periodically when they were in their rooms, placing an intercom speaker and receiver in each room that is left on all night long, and providing anger management classes to the residents as needed. Despite being aware of the considerable number of assaults at the facility, each of the defendants have averred that they were not aware that there was an excessive or substantial risk of serious harm to any of the youths housed at the GRYDC.

On October 6, 1997, Plaintiffs instituted the instant suit for damages in the State Court of Fulton County against Andrews, Davis, Walker (collectively referred to herein as "Defendants"), and two other officials with the

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[6] In fact, Andrews himself was assaulted on at least two occasions by detainees at the facility.

DJJ, alleging that the conditions at the GRYDC violated Mullins' rights under both the Eighth and Fourteenth Amendments to the United States Constitution.[7] Plaintiffs also asserted claims under the Georgia Tort Claims Act against Defendants. Defendants removed the action to this Court based upon the Court's original jurisdiction over claims brought pursuant to the United States Constitution. Plaintiffs' state law claims (Counts One, Four and Five) were subsequently remanded to the State Court. In addition, Plaintiffs' claims against Defendants in their official capacities were dismissed by this Court. As such, the only claims remaining to be adjudicated before this Court are Plaintiffs' federal constitutional claims against Andrews, Davis, and Walker in their individual capacities.

II. DISCUSSION

A. Summary Judgment Standard

Summary judgment is proper only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The movant carries the initial burden of showing the court that there is "an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986). "Only when that burden has been

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[7] Upon motion of Plaintiffs, the two other DJJ officials sued, Tom Coleman and Robert Riols, have been dismissed without prejudice from this action.

met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). The non-movant is then required "to go beyond the pleadings" and present competent evidence in the form of affidavits, depositions, admissions and the like, designating "specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324, 106 S.Ct. at 2553.

A court evaluating a summary judgment motion must view the evidence in the light most favorable to the non-movant. *Samples v. City of Atlanta*, 846 F.2d 1328, 1330 (11th Cir. 1988); *Tippens v. Celotex Corp.*, 805 F.2d 949, 953 (11th Cir. 1986), *reh'g denied*, 815 F.2d 66 (11th Cir. 1987). However, Rule 56 "[b]y its very terms, . . . provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. The requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-8, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (emphasis in original). The materiality of facts is governed by the substantive law. *Id.* at 248, 106 S.Ct. at 2510. A dispute is genuine if the evidence is such that the factual issues may reasonably be resolved in favor of either party. *Id.* at 250, 106 S.Ct. at 2511.

B. Plaintiffs' Constitutional Claims

In the first instance, the Court notes that the Eighth Amendment's prohibition against cruel and unusual punishment is applicable only to convicted prisoners, rather than to detainees in juvenile facilities such as

Mullins. Instead, Mullins' constitutional rights arise from the Due Process Clause of the Fourteenth Amendment. *Hale v. Tallapoosa County*, 50 F.3d 1579, 1582 n. 4 (citation omitted). However, the same standard may be applied to claims under both constitutional provisions. *See Cottrell v. Caldwell*, 85 F.3d 1480, 1490 (11th Cir. 1996). In order to survive summary judgment on their constitutional claims, Plaintiffs must "produce sufficient evidence of (1) a substantial risk of serious harm [at the GRYDC]; (2) the defendants' deliberate indifference to that risk; and (3) causation." *Hale*, 50 F.3d at 1582 (citations omitted).[8]

In the present case, it appears from the evidence that there was a substantial risk of serious harm at the GRYDC. Indeed, for the two years prior to the assault upon Mullins, there were approximately 157 student-on-student assaults and 32 student-on-staff assaults at the facility. Even after the assault upon Mullins, there have been several other violent physical and sexual assaults upon children at the GRYDC after these children had been placed in rooms with three or more other children. It is also undisputed that the GRYDC was seriously overcrowded.

The Court also finds that genuine issues of material fact exists [sic] regarding whether Defendants were deliberately indifferent to the risk of harm at the GRYDC. Deliberate indifference occurs when "the official knows of and disregards an excessive risk to [the detainee's] health or safety; the official must both be aware of facts from which

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[8] Defendants do not dispute that they were acting under color of state law.

the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S.Ct. 1970, 1979, 128 L.Ed.2d 811 (1994). While each of the defendants has averred that they were unaware of a substantial risk of harm to any of the youth at the GRYDC, as discussed above, Defendants were in fact aware of the numerous assaults that occurred at the facility both prior to and after the assault upon Mullins,[9] and they were also aware that the facility was seriously overcrowded. Defendants aver that they attempted to use the measures available to them to reduce the risk of physical and sexual attacks at the GRYDC, including transferring residents to less crowded RYDCs and releasing low risk youths. Defendants have failed, however, to adequately demonstrate how and if these measures were carried out. They have pointed this Court to no documentation evidencing how many youths were in fact transferred or released from the facility during the relevant period. In addition, Walker testified that he had the power to put caps on the number of juveniles housed in each facility if it was requested that he do so by Davis, but there is no evidence that Walker did so, or that he was asked to do so, with respect to the GRYDC, even though the facility was operating at more than double its capacity at the time of Mullins' assault.[10] Further, with respect to their contention that they

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[9] Indeed, even Andrews himself was assaulted on more than one occasion while working at the facility.

[10] Walker testified that no cap would be placed on the number of juveniles housed in a particular facility unless the facility director determines that the situation is intolerable and that the facility cannot accept any more juveniles.

attempted to prevent violence at the facility by requiring the staff to make periodic room checks and placing an intercom system in each room, Defendants have provided no evidence that sufficient room checks were made or that the intercom system was operating or being monitored on the night of Mullins' assault.[11] Indeed, only two staff members were present to supervise and monitor sixty children on the night of the assault. It is also clear that an inadequate classification system was employed at the GRYDC because the decision to place Mullins in the room with the 3 other boys, two of whom had committed violent offenses, was made by a staff member at the GRYDC rather than Andrews, even though Walker has testified that Andrews or one of his supervisory personnel were responsible for classifying youth at the GRYDC.[12] In addition, Andrews and his staff failed to document room assignments as requested by Davis, and there is insufficient evidence of an attempt to separate violent and nonviolent offenders in times of overcrowding at the GRYDC.[13]

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[11] According to RYDC policy and procedure, room checks are to be made every 30 minutes. However, both Plaintiffs' expert and the Department of Family and Children Services ("DFCS") recommended that room checks be made more frequently when two or more boys have been housed in the same room due to overcrowding.

[12] While Walker sought and obtained additional funding for the DJJ in an attempt to increase the capacity of the RYDCs and address the problem of overcrowding at these facilities, as discussed *infra*, an inadequate classification system was being employed at the GRYDC during times of overcrowding.

[13] With respect to the classification of youths at the GRYDC, the DFCS recommended that the severity of the child's offense should be a controlling factor in room assignments, and the Justice Department

(Continued on following page)

With respect to the element of causation, the Court finds that genuine issues of material fact also exist regarding whether Defendants' alleged failure to properly address the undisputed and well-documented overcrowding and violence at the GRYDC contributed to and resulted in the assault upon Mullins. *See, e.g., Hale,* 50 F.3d at 1584-85 (summary judgment denied where plaintiff presented sufficient evidence that "the excessive risk of violence flowed from an atmosphere of deliberate indifference reflected in [the defendant's] failure to classify or segregate violent from non-violent inmates, assign inmates to cells or beds, adequately train the jailers, and adequately supervise and monitor the inmates").[14] Because factual issues remain to be determined by a jury, Defendants' motion for summary judgment must be DENIED.[15]

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also recommended that a more comprehensive classification system should be employed for residents at the various RYDCs. Apparently Davis attempted to impose a more rigorous classification system based upon the nature of the particular child's offense, but due to some concern by the RYDC directors that they would be unable to comply with the system given the space and number of children at the facility, the system was not implemented.

[14] Because issues of fact remain with respect to whether Defendants were deliberately indifferent to a serious risk of harm at the GRYDC and whether this indifference resulted in the assault upon Mullins (which would amount to a constitutional violation), Defendants are not entitled to summary judgment on qualified immunity grounds.

[15] Defendants may attempt to argue at trial that they were constrained by insufficient budgetary allocations for the GRYDC. The Court notes here that the Supreme Court held in *Youngberg v. Romeo*, 457 U.S. 307, 323, 102 S.Ct. 2452, 2462, 73 L.Ed.2d 28 (1982), that "[i]n an action for damages against a professional [operating a state facility for mentally retarded individuals] in his individual capacity, . . . , the professional will not be liable if he was unable to satisfy his normal

(Continued on following page)

III. CONCLUSION

For the above-stated reasons, Defendants' Motion for Summary Judgment [49-1] is DENIED.

It is SO ORDERED this 18th day of January, 2000.

/s/ Clarence Cooper
CLARENCE COOPER
UNITED STATES DISTRICT JUDGE

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professional standards because of budgetary constraints; in such a situation, good-faith immunity would bar liability."

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-14042-HH

TANGIE JUDY,
individually and in her capacity
as mother and Natural Guardian
of D.M., a Child,

Plaintiff-Appellee,

versus

EUGENE P. WALKER,
individually and in his capacity
as Commissioner of the Department
of Juvenile Justice,
NATHAN DAVIS,
individually and in his capacity
as Director of the Division of Detention
Centers of the Department of Juvenile Justice,
JESSE ANDREWS,
individually and as the Director of the
Gwinnett Regional Youth Detention Center,

Defendants-Appellants.

On Appeal from the United States District Court for the
Northern District of Georgia

(Filed Jul. 25, 2003)

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC (Opinion _____, 11th Cir., 19__, ___ F.2d [sic] ___).

Before: BIRCH, HULL and RONEY, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Frank M. Hull
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-14042-HH

TANGIE JUDY,
individually and in her capacity
as mother and Natural Guardian
of D.M., a Child,

Plaintiff-Appellee,

versus

EUGENE P. WALKER,
individually and in his capacity
as Commissioner of the Department
of Juvenile Justice,
NATHAN DAVIS,
individually and in his capacity
as Director of the Division of Detention
Centers of the Department of Juvenile Justice,
JESSE ANDREWS,
individually and as the Director of the
Gwinnett Regional Youth Detention Center,

Defendants-Appellants.

On Appeal from the United States District Court for the
Northern District of Georgia

(Filed Aug. 6, 2003)

ORDER:

(X) The motion of Appellants, Eugene P. Walker, Nathan Davis and Jess [sic] Andrews, for (x) stay ( ) recall

and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

( ) The motion of Appellants, Eugene P. Walker, Nathan Davis and Jess [sic] Andrews, for (x) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including _____, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of Appellants, Eugene P. Walker, Nathan Davis and Jess [sic] Andrews, for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

( ) *IT IS ORDERED* that the motion of Appellants, Eugene P. Walker, Nathan Davis and Jess [sic] Andrews, for a further stay of the issuance of the mandate is DENIED.

/s/ Frank M. Hull
UNITED STATES CIRCUIT JUDGE

Supreme Court, U.S.
FILED
NOV 24 2003
OFFICE OF THE CLERK

(2)

No. 03-608

In the
Supreme Court of the United States

NATHAN DAVIS, JR.; Jesse Andrews,
Petitioners,
v.
TANGIE JUDY; Danny Mullins,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF ALABAMA, DISTRICT OF COLUMBIA, DELAWARE, HAWAII, LOUISIANA, MISSOURI, NEVADA, SOUTH CAROLINA, UTAH, AND THE VIRGIN ISLANDS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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November 24, 2003

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QUESTIONS PRESENTED

1. May a court find state officials deliberately indifferent to the problem of inmate-on-inmate assault at a state custodial detention facility, in violation of the Fourteenth Amendment, when the officials took reasonable steps to ameliorate the problem and did not have the authority to allocate resources to relieve the overcrowding and understaffing that were at the root of the problem, because the court in 20/20 hindsight would have selected other measures to address the problem?

2. Did the abstract principle that a state official may not show "reckless disregard" for known risks at custodial facilities give the state officials in this case fair warning that the steps they took within their power to ameliorate the problem of inmate-on-inmate assault were not enough to satisfy the Fourteenth Amendment, such that these officials are not entitled to qualified immunity?

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Michael J. Dale, *Lawsuits and Public Policy: The Role of Litigation in Correcting Conditions in Juvenile Detention Facilities*, 32 U.S.F. L. Rev. 675 (1998) 6

INTEREST OF AMICI CURIAE

The amici States and Territory submit this brief in support of petitioners Nathan Davis and Jesse Andrews. At all times relevant to this case, Davis was the director of the Division of Detention Services of the Georgia Department of Juvenile Justice. Andrews was the director of the Gwinnett Regional Youth Detention Center in Lawrenceville, Georgia, one of the facilities under Davis's supervision. The Eleventh Circuit Court of Appeals held that Davis and Andrews were not immune from a § 1983 suit brought against them by a juvenile inmate who was assaulted by another juvenile inmate at the Lawrenceville detention center.

Amici urge this Court to grant the petition for certiorari and reverse the judgment of the Eleventh Circuit. The amici States have an interest in maintaining their prerogative to develop and implement policies regarding custodial detention. They also have an interest in protecting their agents from the inconvenience and expense of litigation and from financial liability for policy choices made under conditions that their agents cannot control. These interests are threatened by the ruling of the Eleventh Circuit. The ruling exposes Davis and Andrews to suit despite the numerous measures they each took to address the problem of inmate-on-inmate assaults. It also exposes them to suit for conditions that they could not control: overcrowding, understaffing, and constant willful misbehavior on the part of numerous juvenile inmates.

While the Eleventh Circuit's ruling addressed a juvenile detention facility, the ruling applies perforce to adult correctional facilities run by the States. The ruling would also seem to apply to other state custodial

regimes such as foster care and mental health facilities. The amici States each have tens of thousands of persons in these types of custodial detention. The State of Alabama alone has custodial care of approximately 40,000[1] persons (one percent of the total state population) in its Department of Corrections, Department of Human Resources, Department of Mental Health, and Department of Youth Services. The ruling of the Eleventh Circuit opens the door for many of these individuals to sue the state officials responsible for supervising their detention facilities, and to strip these officials of their qualified immunity, if the individuals can convince a court to exercise 20/20 hindsight and rule that another remedial measure not taken by the officials might have prevented the problem. This kind of standard will dilute qualified immunity of its intended protective effect and will chill state officials in the exercise of their public duties.

SUMMARY OF ARGUMENT

As in most qualified immunity cases, this case presents two separate but related questions. Under *Saucier v. Katz*, 533 U.S. 194 (2001), they must be addressed in the following order. First, did the actions of the state officials, as alleged, violate the Fourteenth Amendment? Second, if they did violate the Fourteenth Amendment, was the law so "clearly established" that the state officials had "fair warning" that their actions violated the Fourteenth Amendment?

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[1] Counsel for the State of Alabama calculated this figure during the week prior to the filing of this brief from internal documents and interviews with agency officials.

As for the second question, amici agree with the petitioners' analysis in part II of their petition. The Eleventh Circuit has misread *Hope v. Pelzer*, 536 U.S. 730 (2002), to liberate it of the need to consider whether any cases with remotely similar facts were available to give Davis and Andrews fair warning that the actions they were taking violated the Fourteenth Amendment. Although *Hope* made clear that, in egregious circumstances, the constitutional violation may be so obvious that on-point precedent is not necessary to give a state official fair warning, *Hope* did not unleash the lower courts to equate 20/20 hindsight with obviousness. Nor did *Hope* permit the courts to treat abstract legal standards as "clearly established" and therefore sufficient to put a state official on notice that he is committing a constitutional violation in a particular case. The Eleventh Circuit found it "clearly established that a prison administrator violates an inmate's Fourteenth Amendment rights when the administrator recklessly disregards known dangers of inmate-on-inmate violence." *Judy v. Walker*, No. 02-14042 (11th Cir. May 30, 2003) (per curiam) (Pet. App. 20a). This statement is true, but it begs the question of when an administrator has been "reckless". The Eleventh Circuit cited no precedent and provided no analysis why Davis and Andrews should be have been on notice that the considerable efforts they made to improve conditions at the Lawrenceville detention center were recklessly insufficient to satisfy the Fourteenth Amendment. This misreading of *Hope v. Pelzer* warrants certiorari review in its own right.

Amici submit this brief primarily, however, to urge certiorari review of the first question: whether Davis and Andrews committed any Fourteenth Amendment violation. Amici believe that a correct answer to this question is essential to their ability to maintain

custodial facilities free from the chilling effect of harassing lawsuits and potential monetary liability. In analyzing the Fourteenth Amendment, the Eleventh Circuit made two critical errors that warrant certiorari review.

First, the Eleventh Circuit flouted the well-settled principle that federal courts should defer to the policy choices of state officials when analyzing the constitutionality of state custody regimes. This Court has held in many cases that state policymakers deserve considerable leeway in making difficult decisions balancing competing considerations that are not always within their immediate control. The Eleventh Circuit here wandered far afield of that precedent and showed little deference to the petitioners in this case.

Second, this case presents this Court with the opportunity to expand upon the "cost" defense first mentioned in *Wilson v. Seiter*, 501 U.S. 294, 302 (1991). It also presents the Court with an opportunity to clarify the subjectivity requirement of *Farmer v. Brennan*, 511 U.S. 825, 837 (1994), which appeared to limit the liability of state officials when they have taken affirmative steps to cure an existing problem but were not entirely successful. Here, petitioners employed five measures to cure any problems that existed at the detention facility and were unable to create massive reforms because of limitations placed on them by the state constitution. Under these circumstances, petitioners should not be held to have violated the Fourteenth Amendment.

ARGUMENT

Petitioners Davis and Andrews took five different steps to curtail inmate-on-inmate assaults at the

Lawrenceville detention center. Nevertheless, the Eleventh Circuit held that Davis and Andrews were deliberately indifferent to the risks of assault, because they might have taken even more measures that might have prevented the assault that occurred in this case. *Judy v. Walker*, No. 02-14042 (11th Cir. May 30, 2003) (per curiam) (Pet. App. 18a-19a, 23a). This poorly reasoned opinion now threatens to expose numerous state officials to liability by permitting a court to second-guess the manner in which the officials address difficult problems that are not entirely within their control. The Eleventh Circuit reached this decision by disregarding this Court's repeated admonitions to defer to the policy-making authority and expertise of state legislative and executive bodies. The ruling of the Eleventh Circuit, if taken to its logical conclusion, will undermine state prerogative in the administration of their custodial facilities and will eviscerate qualified immunity.

I. This Court Should Grant Certiorari to Correct the Eleventh Circuit's Failure to Give Sufficient Deference to the Difficult Policy Decisions Made by the Georgia Officials Responsible for Administering Georgia's Juvenile Detention System.

This Court has consistently afforded state-level policymakers a high degree of deference when those officials make decisions regarding the operation of state custody regimes. The most readily employable example of this deference is in the operation of state correctional facilities. There is little principled distinction between the state correctional facilities that this Court has extensively discussed and the youth detention facility at issue in the present case. Further, it is imminently foreseeable that plaintiffs

will use the decision of the Eleventh Circuit as a vehicle to attack state-level decision-making in the administration of other custodial regimes, including mental health facilities, hospitals, juvenile detention facilities, and foster care programs — an effort that some advocates have undertaken for several years.[2]

In *Procunier v. Martinez*, 416 U.S. 396, 405 (1974), *overruled in part by Thornburgh v. Abbott*, 490 U.S. 401 (1989),[3] this Court stated that "courts are ill-equipped to deal with the increasingly urgent problems of prison administration". The Court restated that the judicial branch has traditionally "adopted a broad hands-off attitude toward the problems" associated with the operation of state facilities, and the Court correctly reasoned that the problems associated with operating those facilities "are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree." *Martinez*, 416 U.S. at 404-05.

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[2] *See, e.g.*, Michael J. Dale, *Lawsuits and Public Policy: The Role of Litigation in Correcting Conditions in Juvenile Detention Facilities*, 32 U.S.F. L. Rev. 675 (1998). Because attorneys for potential plaintiffs will argue that all state custodial facilities should be subject to the same arguments traditionally used against adult-level correctional facilities, amici urge that this Court similarly employ the same deference to the state officials in this and other cases that it would to officers in adult correctional facilities. This similarity has also been recognized by federal circuit courts. *E.g.*, *Alexander v. Boyd*, 113 F.3d 1373 (4th Cir. 1997) (applying provisions of the Prison Litigation Reform Act to juvenile facilities).

[3] Though partially overruled by *Thornburgh*, the rationale and legitimacy of the quoted portions of *Martinez* remain undisturbed. In fact, *Thornburgh* mandated a greater degree of deference to state officials. 490 U.S. at 413-14.

The Court has repeatedly shown deference to state officials and the regulations that they have promulgated in numerous cases. *See, e.g., Sandin v. Connor*, 515 U.S. 472, 482 (1995) ("[F]ederal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment"); *Turner v. Safley*, 482 U.S. 78, 89-90 (1987) ("[A] standard [of deference] is necessary if 'prison administrators ..., and not the courts [are] to make the difficult judgments concerning institutional operations'") (quoting *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119, 128 (1977)); *Bell v. Wolfish*, 441 U.S. 520 (1979). Further, the Court has recognized that the comprehensive planning and resource allocation decisions that must be made to operate state custody regimes "are peculiarly within the province of the legislative and executive branches of government." *Martinez*, 416 U.S. at 405. Deference to state officials covers responses not only to specific incidents to which officials are forced to respond, but also to "prophylactic or preventive measures intended to reduce the incidence of ... breaches of prison discipline." *Whitley v. Albers*, 475 U.S. 312, 322 (1986).

Even the Eleventh Circuit has acknowledged that

> Congress's intention in enacting the [Prison Litigation Reform Act] looks to be in line with the Supreme Court's view on the involvement of the federal courts in state prison systems. Both Congress and the Court suggest a reduced role for federal courts. When confronted with state prison litigation, the Supreme Court has written that "involvement of federal courts in the day-to-day management of prisons [has led to] squandering judicial resources with little offsetting benefit to anyone .... [F]ederal courts

> ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment ...."

Parrish v. Dep't of Corrections, 156 F.3d 1128, 1129 n.2 (11th Cir. 1998) (alterations in original) (citing and quoting *Sandin v. Conner*, 515 U.S. 472, 482 (1995)). "Congress designed Section 3626 to ensure that prospective relief is the '*minimum* necessary to correct the violation of a federal right.'" *Id.* (quoting H.R. Conf. Rep. 104-378 (1995)) (emphasis in original). In fact, even here, the Eleventh Circuit acknowledged that its ruling came "perilously close" to the judicial second-guessing of "difficult" state policy questions. *Judy v. Walker*, No. 02-14042 (May 20, 2003) (Pet. App. 19a, 23a) (citing *LaMarca v. Turner*, 995 F.2d 1526, 1538 (11th Cir. 1993)).

Deference "requires that neither judge nor jury freely substitute their judgment for that of officials who have made a considered choice." *Whitley*, 475 U.S. at 322. Because the Eleventh Circuit ignored that principle here, this Court should grant certiorari to review and reverse the judgment of the Eleventh Circuit.

II. This Court Should Grant Certiorari to Address the Question Left Open in *Wilson v. Seiter* Whether State Officials May Invoke a "Cost" Defense to Claims of Deliberate Indifference.

A state official responsible for administering a state custodial facility cannot violate the Fourteenth Amendment without exhibiting "deliberate indifference" to the custodial condition at issue. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994); *Wilson v. Seiter*, 501 U.S. 294, 303 (1991). In turn, a state

official cannot be deliberately indifferent "unless the official knows of and disregards an excessive risk to inmate health or safety." *Farmer*, 511 U.S. at 837.

In *Wilson v. Seiter*, 501 U.S. 294 (1991), this Court wrote that "the validity of a 'cost' defense as negating the requisite intent is not at issue in this case, since respondents have never advanced it." *Id.* at 302. Here, by contrast, the petitioner state officials have made a compelling case that they did not have the resources necessary to alleviate the overcrowding and understaffing problems that led to the inmate-on-inmate assault. Petition for a Writ of Certiorari, Davis v. Judy, No. 03-0608, at 4-6. This Court should grant certiorari to address whether a lack of resources may negate the subjective intent required to make out "deliberate indifference" under *Wilson* and *Farmer*.

Here, Davis and Andrews had neither the discretion to turn away juveniles that the courts sent to them nor the constitutional authority to increase their budget to a level that would cure the overcrowding problems at the root of this case. Ga. Const. art. VI, § 1, ¶¶ 1, 4; Ga. Code Ann. §§ 15-11-46, -47(a)(3), -49 (2001); *see also Braircliff Haven, Inc. v. Dep't of Human Resources*, 403 F. Supp. 1355, 1361 (N.D. Ga. 1975). Furthermore, Davis and Andrews took five remedial measures to cure the defect. *Judy v. Walker*, No. 02-14042 (11th Cir. May 30, 2003) (per curiam) (Pet. App. 17a) (listing the five remedial measures taken to prevent assaults at the Lawrenceville detention center). These measures should have been sufficient to grant them qualified immunity from suit.

Davis and Andrews did not turn a blind eye to the problems facing the Lawrenceville detention center. They repeatedly took steps within their power to ensure the safety of the juveniles in their charge. They

should not therefore be legally responsible for the decision of higher-ranking officials to allot them a finite amount of resources to run the center. They should not be responsible for the decision of the coequal judicial branch to sentence juveniles to the Lawrenceville detention center.

Amici do not contend that all modes of legal recourse should be foreclosed to individuals like respondents. Respondents simply need to identify and sue the properly responsible parties. After all, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984). To be true to the subjective intent requirement of *Farmer*, a defendant who has some element of subjective culpability should be the party against whom a judgment of personal liability is rendered. 511 U.S. at 837. When, as here, the defendants took numerous steps to alleviate the problem and were handcuffed by budgetary restrictions beyond their control, they should not be deemed to have violated the Fourteenth Amendment.

In short, the Court should grant certiorari review in this case to consider the validity of the "cost" defense, a question the Court left open in *Wilson v. Seiter*. Amici urge that this Court accept the "cost" defense, because it comports with the subjectivity requirement of *Farmer* and vindicates bedrock principles of justiciability. Simply put, petitioners Davis and Andrews have been sued, and have been stripped of their qualified immunity, for circumstances that they could not help.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari review to reverse the ruling of the Eleventh Circuit Court of Appeals.

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November 24, 2003